tion 5(2). However, until a fair rent has been determined in accordance with section 7 of the 1966 Act any rent permitted under Kelantan Enactment No. 17 of 1964 is also permitted under the 1966 Act by virtue of section 27 thereof and its proviso ....."

The conclusion reached by us as regards the Suit No. 57/75 is that –

(1) the $2,000.00 rent is permitted under the proviso to section 27 of the 1966 Act and therefore lawful, it being permitted by the repealed Kelantan Enactment No. 17/1964.

(2) it is not for the court to determine the fair rent as regards the $5,000.00 rent under the second lease agreement.

There is no question of excess of rent having arisen and as such no recovery thereof could be claimed.

In conclusion the tenant's appeal in respect of CS No. 89/75 is allowed with costs and their appeal in respect of CS No. 57/75 is dismissed, also with costs.

As the LBKB was drawn into the dispute between the landlord and the tenant by the landlord's apparent show of charity of insisting to pay higher rates, the cost of the LBKB should, in our judgment, be borne by the landlord.

The deposit for this appeal should be refunded to the appellant.

Order accordingly.

Solicitors: *Adnan, Sundra & Low; Wrigglesworth & Co.*

LEMBAGA KEMAJUAN TANAH PERSEKUTUAN v. MARIAM & ORS.

[F.C. (Salleh Abas C.J. (Malaya), Hashim Yeop A. Sani and Syed Agil Barakbah F.JJ.) January 9 & January 27, 1984]

[Kuala Lumpur – Federal Court Civil Appeal No. 160 of 1983]

Torts – Occupier's Liability – Collapse of kongsi-house on land – Deceased killed in mishap – Liability of occupier – Res ipsa loquitur.

In this case the appellants, a statutory authority under the Land Development Ordinance, 1956, entered into a written agreement with a contractor to weed and maintain a land scheme in Pahang. Unknown to the appellants, the work was sub-contracted and amongst the workers employed by the sub-contractor was the deceased. He and his fellow workers lived in a Kongsi-house built on the scheme by either the contractor or the sub-contractor. The Kongsi-house collapsed and the deceased was killed in the mishap. The dependants of the deceased sued the contractor, sub-contractor and the appellants. Judgment in default of appearance was entered against the contractor and sub-contractor and the case proceeded against the appellants. In the High Court judgment was given against the appellants. They appealed. The appellants denied liability (a) on the ground that the kongsi-house collapsed because of a whirlwind and they pleaded act of God and (b) that as the sub-contract was unauthorised, the sub-contractor's employee, that is, the deceased must in the circumstances of the case be a trespasser and as such the appellants owed him no duty of care at all.

Held: (1) the finding of the learned Judge that there was no satisfactory evidence led on the point that there was a whirlwind is correct and cannot be impugned;

(2) the appellants did not cease to be in possession of the site and continued to be the occupier of the site. The erection and existence of the kongsi-house were for the common benefit of the appellants, the contractors and the labourers. The appellants had a duty to ensure that the contractors complied with their obligations and in particular to ensure that the kongsi-house was safe for the workers to live in;

(3) in this case *res ipsa loquitur* applied in that the kongsi-house must have been unsafe for human habitation and the appellants were therefore guilty of negligence.

Cases referred to:

(1) *Donoghue* v. *Stevenson* [1932] A.C. 562, 580.
(2) *Grant* v. *Australian Knitting Mills Ltd.* [1936] A.C. 85, 101 – 102.
(3) *Greene* v. *Chelsea Borough Council* [1954] 2 Q.B. 127, 138.
(4) *A.C. Billings & Sons Ltd* v. *Riden* [1958] A.C. 240.
(5) *Clay* v. *A.J. Crump & Sons Ltd* [1964] 1 Q.B. 533.

FEDERAL COURT.

S. Kulasegaran (*Tho Yow Leong* with him) for the appellant.

Christopher Foo for the respondents.

Cur. Adv. Vult.

Salleh Abas C.J. (delivering the judgment of the court): Felda is a statutory authority created by Land Development Ordinance 1956, whose object according to the long title is "to open and carry out projects for land development and settlement ..." In connection with its land Scheme at Sungai Retang, Jerentut, Pahang, it entered into a written agreement with a firm called Seng Kwee Company (referred to in this judgment as "the

Contractor") on March 26, 1974 for the weeding and maintenance of the Scheme. The agreement contained a provision against sub-contracting in the following terms:

"14. The Contractor shall not without the written consent of the Chairman first obtained assign this Contract or sub-contract all or any portion of the Works; provided that such consent shall not be unreasonably withheld to the prejudice of the Contractor. In the event of all or any portion of the Works being sub-contracted with the written consent of the Chairman the Contractor shall be solely and personally responsible for the due observance by such authorised sub-contractors of all the terms, stipulations and Conditions herein expressed."

Unknown to Felda, and without its permission, the work was subcontracted to one Hiew Pin Lee @ Siew Pin Leong (referred to as "the sub-contractor"). Amongst the workers employed by the sub-contractor was one Nordin bin Abdullah (the deceased). He and his fellow workers lived in a kongsi-house built on the Scheme by either the contractor or the sub-contractor.

On the night of July 9, 1974 the kongsi-house collapsed and the deceased was killed in that mishap. He left eight dependants, namely his widow and seven children, four of whom were very young. These dependants sued the contractor, the sub-contractor and Felda under section 7 of the Civil Law Act 1956 (Revised – 1972), Act 67, for loss of dependency and support.

On the date of the trial the contractor and sub-contractor were missing. The contractor's counsel who was present asked the court for his discharge from the case. After his counsel had obtained the discharge and a judgment in default against the two missing defendants having been entered, the trial then proceeded against Felda, the remaining defendant.

The cause of action is liability under the general doctrine of negligence in that Felda failed to provide a safe kongsi-house and also under a special sub-head of negligence as an occupier/owner of the Scheme.

The learned trial judge held Felda liable and accordingly entered judgment for the deceased's dependants in the sum of $28,000.00 of which $7,000.00 was a pre-trial loss of dependency, plus interest which is at 4% per annum on the $7,000.00 from the date of the service of the writ to the date of judgment and thereafter at 8% per annum on the total amount till realisation.

The appeal is only confined to the question of liability. Counsel for Felda submitted to us that the kongsi-house collapsed because of whirlwind. He, therefore, pleaded act of God. We cannot accept this submission. We think that the finding of the learned trial judge that there was no satisfactory evidence led on this point is correct and cannot be impugned. Mr. Bong Bon Kong, Felda's manager for this Scheme, certainly had no personal knowledge of the matter. In his evidence he said this:

"I was told by my staff that there was a whirlwind at the vicinity of the Scheme."

This evidence is clearly hearsay and was therefore rightly rejected by the learned trial judge. The next evidence which counsel relied upon is a police report lodged by one Malayan s/o Munusamy (Jerentut Police Report No. 757/74) to the effect that there was "the sound of loud wind and rain" on that night. But this document was not agreed to by the plaintiff. Therefore, nothing short of calling its reporter could make it admissible. Hence there is no evidence upon which the defence of act of God could stand.

As to the issue of negligence, Felda did not know that the contractor in breach of the agreement with Felda had sub-contracted the work. Counsel for Felda, therefore, submitted that as the subcontract was unauthorized, the sub-contractor's employee, i.e. the deceased, must in the circumstances of the case be a trespasser and as such Felda owed him no duty of care at all.

With respect, we disagree. The submission seems to us to be an attempt to revive a notion which had long been discarded in that tortious liability depends upon contractual relationship and that since Felda and the deceased had no contractual relationship with each other, Felda therefore owed no duty of care to him at all.

This notion was abandoned in England by the House of Lords in *Donoghue* v. *Stevenson*[1] and it was, to paraphrase Professor Winfield, given a "decent burial" by the Privy Council in *Grant* v. *Australian Knitting Mills Ltd.*[2] An attempt to revive it was repelled by Lord Denning in *Greene* v. *Chelsea Borough Council.*[3] These cases establish that a person owes a duty of care even to persons who have no contractual relationship with him, and that his liability to an injured person depends upon whether the injury was caused by his act or omission. It is the nature of his act and

omission that makes him liable. Thus a contractor who obstructed the normal approach to a house which he was engaged to reconstruct was held liable to a visitor of the house, when the latter was injured as a result of using a dangerous alternative access, despite the fact that the visitor had been informed of and appreciated the danger (see *A.C. Billings & Sons Ltd.* v. *Riden.*[4]) The duty cast upon the contractor in this case was not derived from the contract between him and the owner of the house but one which is cast by law in that because of the danger created by him, he must take a reasonable care to ensure that visitors were not exposed to it.

Thus, in our view, the deceased in the instant appeal may well be employed in the Scheme in breach of Felda's agreement with the contractor and may be even regarded by it, as its counsel said, as a trespasser, but this consideration is irrelevant for the purpose of determining Felda's liability in tort. Certainly, the presence of the deceased in the Scheme and the work he was doing did not render him an undesirable person. His job there was all for the benefit of Felda and was within the purpose of Felda's contract with the contractor and above all within the object for which Felda was established. The learned trial judge was correct in holding that the deceased was not a trespasser but a person who entered upon the Scheme as an invitee. After all an invitee is a person who shares a common or joint interest with the occupier.

But counsel submitted that even if the deceased was an invitee, Felda was not an occupier because it had parted with exclusive possession of the site to the contractor.

In order to deal with this question it is necessary to take into account Felda's position under the contract. Only after we consider the contract will we be able to say whether or not Felda had breached the duty of care which it owed to the deceased. The contract, whilst irrelevant to determine the existence of duty, is however relevant for the purpose of determining the nature of the duty and therefore its breaches. The rule is that whilst an injured person is not barred from getting a remedy because he is not a party to the contract, but to determine the question whether the defendant breaches the duty or not, the contract which he has signed is nevertheless relevant. (see *Clay* v. *A.J. Crump & Sons Ltd.*,[5] and *Winfield*, 11th Ed. p. 69).

According to the contract, possession of the site was given to the contractor "as complete as may be reasonably possible but not so as to constitute a tenancy" (clause 24(b) of the agreement). Counsel for Felda submitted that because of this, the contractor had exclusive possession of the site and Felda, therefore, could not be held to be an occupier so as to render it liable to the deceased invitee. We do not think that the expression we quoted above made Felda no longer an occupier. Felda retained a great deal of control under this contract. For example –

(1) work had to be done in accordance with the direction and satisfaction of Felda's superintending officer (clause 1(a)).

(2) The superintending officer was empowered to issue directions in his absolute discretion in regard to a number of matters, including (i) prescribing the minimum number of labourers to be engaged, (ii) removal of unwanted materials brought in by the contractor; and (iii) dismissal of unwanted and undesirable workers (clause 1(a)(i), (ii) & (iii).

(3) The superintending officer had access to the work. (clause 9), and

(4) The superintending officer had power to ensure compliance with labour laws by the contractor, as regards wages, days and time of work, insurance and other matters.

The superintending officer is the manager of the Scheme and he is Mr. Bong Bon Kong.

In view of these provisions which show that not only the general control and supervision of the work but also the well-being of the labourers working in the Scheme were left with Felda, we think that Felda did not cease to be in possession of the site. After all an occupier is a person who has control over the relevant premises or site. If an owner demised his premises he certainly parted with possession of it, but here the possession given was said to be not as complete as to amount to a tenancy. This fact coupled with the general control and supervision which Felda had clearly indicate that Felda was also an occupier of the Scheme. There is nothing wrong in having more than one occupier in respect of one site or premises. This is an agricultural contract and it is common knowledge that besides weeding for which Felda entered into a contract with the contractor, there must be other works, such as planting, replanting, earth work, fertilising, insecticiding etc. which were re-

quired to be done. In our view, the possession that was given to the contractor was only such as was reasonably necessary for the purpose of weeding and maintaining the Scheme. Felda, therefore, was still an occupier.

Now what duty did Felda as an occupier owe to the deceased invitee? And, what duty did it breach?

The kongsi-house was not built by Felda, but it knew that it was there and therefore it must have known that labourers lived in it. Although Felda seemed rather indifferent to its existence, the kongsi-house was not illegally erected as the contractor was entitled to build it under clause 3 of the agreement, requiring the contractor to provide "everything necessary for the proper execution of the works". Provision for labourers' accommodation is surely one of the many things necessary for the proper execution of the works and therefore within the terms of this clause. Without the kongsi-house labourers could not be housed and without labourers works under the contract could not be performed. Thus, the erection and existence of the kongsi-house are for the common benefit of Felda, the contractors and the labourers.

Can Felda now turn round and say it was not liable to the injured occupant because it did not build the kongsi-house? In our view, it cannot. Although Felda did not build it, it allowed it to be erected and used by the weeding labourers, whose work benefitted Felda, and although it had control and supervision of the Scheme and the well-being of the labourers, Felda did nothing to ensure that the kongsi-house was safe for them to live in. It only allowed it to exist and be used. We cannot accept this indifferent attitude as absolving Felda of its duty of care, especially when it is a statutory authority established by the legislature entrusted with social and economic responsibilities. In the discharge of these responsibilities Felda must be fully alive to the object and purpose for which it was established. In this case whilst it correctly retained control and supervision of the Scheme and the general well-being of the labourers, it did nothing to ensure compliance of the obligations undertaken by the contractor. In our view, this is not enough. It must go further and see that they are complied with.

The kongsi-house for unknown reason collapsed. No proper explanation was forthcoming from Felda. An attempt to show that it was caused by a whirlwind failed because the evidence is hearsay.

We therefore held that *res ipsa loquitur* applies in that the kongsi-house must have been unsafe for human occupation and Felda is, therefore, guilty of negligence.

That being the case the appeal is dismissed with costs. The deposit should be paid to the respondents.

Appeal dismissed.

Solicitors: *Ranjit, Thomas & Kula; Murphy & Dunbar.*

SEONG FATT SAWMILLS SDN. BHD. v. DUNLOP MALAYSIA INDUSTRIES SDN. BHD.

[F.C. (Salleh Abas C.J. (Malaya), Abdul Hamid & Syed Agil Barakbah F.JJ.) November 18, 1983 & February 20, 1984]
[Kuala Lumpur – Federal Court Appeal No. 266 of 1981]

Torts – Water flowing from land to neighbouring land and causing damage – Negligence – Nuisance – Liability of owner or occupier of land for escape of water naturally on land – Alteration of natural course of stream.

Practice and procedure – Appeal on questions of fact – Whether appeal court should interfere with finding of trial court.

In this case the learned judge who tried the case had to consider on the evidence before him whether (a) the appellants did carry out substantial earthworks on their land as alleged by the respondents; (b) that as a result of the substantial alterations to the appellants' land, there was created a dangerous situation; (c) that by reason of the aforesaid there was an unnatural use of the appellant's land; (d) that the appellants knew or ought to have known that it was likely to affect the natural flow of water and the previous controlled drainage.

Among the particulars of negligence the respondents alleged that the appellants (a) failed to heed the warnings that the said works could result in serious and sudden floods and could cause damage to the respondents; (b) failed to take any steps to prevent the collection of water on the appellant's land and to prevent the escape of such water, rubble, soil and debris on to the respondent's premises.

The respondents claimed damages in negligence and nuisance as a result of the flood damage caused to their factory and goods. The learned trial judge gave judgment for the respondents. He accepted the evidence of the witnesses on behalf of the respondents and was of the